

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO MARKESE CUMMINGS,

Defendant-Appellant.

UNPUBLISHED

August 5, 2014

No. 312583

Kent Circuit Court

LC No. 12-002310-FC

Before: METER, P.J., and O'CONNELL and SHAPIRO, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I agree with the majority that defendant's convictions should be affirmed and find no error in the trial court's scoring of the sentencing guidelines. I dissent, however, from the majority's conclusion that defendant was subject to the discretionary consecutive sentencing provision of MCL 750.520b(3).

Defendant was convicted of two counts of CSC I, MCL 750.520b(1)(a) (victim under 13 years of age), and was sentenced to 30 to 50 years' imprisonment on each. One of defendant's CSC I convictions arose from his assault of his biological daughter, while the other conviction arose out of a separate assault of his stepdaughter. The trial court stated that defendant's consecutive sentencing was based on MCL 750.520b(3), which provides that "[t]he court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." However, the trial court did not offer any grounds for its implicit conclusion that the offenses were part of the "same transaction."¹ Nor was any such argument was offered by the prosecution. Indeed, the prosecution did not ask the court to impose consecutive sentences² and the Sentencing Information Report completed by the probation agent indicated that the sentences

¹ At sentencing, the trial court simply stated that "[the sentences] can be concurrent or consecutive, at my discretion" and later "I am aware that MCL 750.520b(3) gives me the discretion to order consecutive sentences arising out of the same transaction. I am specifically using my discretion for that, for the protection of small children as well as society."

² The prosecution also did not file a brief in this appeal.

were to be concurrent. On appeal, defendant argues that the trial court lacked the legal authority to impose consecutive sentences.

Six months before defendant's trial, we addressed this very issue in *People v Ryan*, 295 Mich App 388; 819 NW2d 55 (2012). In *Ryan*, the defendant was charged with two sexual penetrations of a single victim in a single assault. We upheld the trial court's imposition of consecutive sentences, noting that "the sexual penetrations . . . grew out of a continuous time sequence in which the act of vaginal intercourse was immediately followed by the act of fellatio" and "[t]hese two particular sexual penetrations sprang one from the other and had a connective relationship that was more than incidental[.]" and, therefore, "arose from the same transaction." *Id.* at 403; see also *People v Johnson*, 474 Mich 96; 712 NW2d 703 (2006).

In the instant case, there was no evidence presented during trial that the two victims were assaulted at the same time or that the assaults occurred so closely in time that they could be considered to be part of a single transaction. During opening and closing arguments, the prosecution did not state that the evidence would show, or that it had shown, that the assaults occurred during a continuous series of events. More to the point, in their testimony, the victims were unable to identify when the assaults occurred except in the most general terms such as the time of year. This was confirmed by those who had conducted interviews of the victims after the allegations came to light. The victims' mother could only testify to the date on which she learned of the assaults.

The majority seems to suggest that a careful reading of the two girls' testimony, along with their mother's, demonstrates that the assaults occurred on the same day and, therefore, were part of the same transaction. However, the trial court made no such factual finding and as already noted, the prosecution has never so argued. The majority makes its factual finding by interpreting certain testimony to conclude that the crime against the defendant's biological daughter occurred before the older girl, defendant's stepdaughter, left for school one day and that the stepdaughter was victimized on the same day after she returned from school. The majority makes this factual finding based upon the stepdaughter's testimony that, on the same day she was assaulted, her sister told her that she also had been victimized. Though she does not say that her sister said she was assaulted that same day, the majority believes that this testimony "supported an inference" that the assaults occurred on the same day. I am uncertain what significance lies in the majority's finding of "inferential support" for such a finding, given that the trial court never articulated such an inference, let alone made a factual finding based upon it. More important, the testimony of the biological daughter makes clear that the majority's inference is erroneous. Defendant's biological daughter testified that the day she told her half-sister that she had been abused was *not* the day on which it occurred. In her testimony, she described the assault and was then asked, "[W]hen did you tell your sister? Was it the same day? Was it a different day? Was it a long time after?" to which she responded, "It was a long time."

Although the consecutive sentencing provision of MCL 750.520b(3) is inapplicable, one may argue that if consecutive sentences are proper for two CSC I convictions that occur in the same transaction, then they should be proper for CSC I convictions that do not occur in the same transaction but are no less heinous. Nevertheless, such sentencing is not provided for by MCL 750.520b(3) and "it is not for us to determine who is more deserving of a consecutive sentence

relative to enactment of sentencing statutes and general policy; that is the Legislature's arena." *Ryan*, 295 Mich App at 409.

Because defense counsel did not object when the trial court imposed defendant's consecutive sentences our review is limited to "plain error effecting defendant's substantial rights." *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). "[D]efendant must show that '1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.'" *Id.*, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "In addition, defendant must show that . . . the error seriously affected the fairness, integrity or public reputation of judicial proceedings." *Kimble*, 470 Mich at 312 (quotation marks, formatting, and citation omitted).

As discussed, the trial court erroneously imposed consecutive sentences in the absence of evidence that defendant's acts of CSC I arose from the "same transaction" under MCL 750.520b(3). Thus, the court's error was plain and defendant was certainly prejudiced by receiving a sentence longer than that permitted by law. *Kimble*, 470 Mich at 312-313. Despite the ugly nature of defendant's crimes, "[i]t is difficult to imagine what could affect the fairness, integrity and public reputation of judicial proceedings more than sending an individual to prison and depriving him of his liberty for a period longer than authorized by law." *Id.* at 313.

Accordingly, I would vacate the portion of defendant's judgment of sentence imposing consecutive sentences for the CSC I convictions and remand for imposition of concurrent sentences.³

/s/ Douglas B. Shapiro

³ I would also find that defendant's trial counsel's failure to object to the trial court's imposition of consecutive sentences fell below an objective standard of reasonableness and likely affected the outcome of the proceedings, rendering counsel's assistance constitutionally ineffective. See *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010).